Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

EMPLOYERS UNDERWRITERS, INC. AND LISA ELLIOTT
Petitioners,

vs.

JIMMY WEAVER, ET UX, JEANETTE WEAVER
Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a claim for benefits under an ERISA plan is preempted only if the claim directly affects the relationship between the employer, the plan and its fiduciaries, and the participants and beneficiaries.

2. Whether a claim for benefits under an ERISA plan is preempted by ERISA when the claimant sues, claiming that he is an employee, but is later found to be an independent contractor.

3. Whether a claim for benefits under an ERISA plan is properly removed when the claimant sues, claiming that he is an employee, but is later found to be an independent contractor.

4. Whether the district court may adjudicate the claim of a person with a colorable, but invalid, claim to be an ERISA participant or beneficiary.

LIST OF PARTIES

PETITIONERS

EMPLOYERS UNDERWRITERS, INC.[1]
LISA ELLIOTT

RESPONDENTS:

JIMMY WEAVER, ET UX,
JEANETTE WEAVER

[1] Employers Underwriters, Inc. has no parents or subsidiaries. It is, however, registered to do business in Texas as "Employers Agency, Inc." and sometimes does business under that name.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME Employers Underwriters, Inc. and Lisa Elliott, Petitioners in this cause, and file this Petition for Writ of Certiorari, requesting that the Supreme Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in favor of Respondents and affirm the judgment of the United States District Court for the Eastern District of Texas.

As grounds for such relief, Petitioners would respectfully show as follows:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix A. This opinion is published as *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172 (5th Cir. 1994). A copy of the Fifth Circuit's judgment is attached hereto as Appendix B. A copy of the Fifth Circuit's order denying Petitioners' petition for rehearing is attached hereto as Appendix C.

The Memorandum Opinion and Order of the District Court for the Eastern District of Texas in No. 9:92cv88, dated January 27, 1993, is unpublished. A copy is attached hereto as Appendix D.

JURISDICTION

The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court on February 9, 1994. Petitioners' motion for rehearing was denied on March 10, 1994.

This petition for writ of certiorari is filed within 90 days after entry of the judgment by the Court of Appeals. This Supreme Court's jurisdiction is founded on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act (ERISA) provides:

Section 3 [29 U.S.C. § 1002] **Definitions**

For purposes of this title:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits

in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

***

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

***

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

***

Section 502 [29 U.S.C. § 1132] **Civil enforcement**

(a) Persons empowered to bring a civil action. A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

***

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) **Amount in controversy; citizenship of parties.** The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

***

Section 514 [29 U.S.C. § 1144] **Other laws**

(a) **Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

***

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

***

28 U.S.C. § 1441 provides:

§1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

STATEMENT OF THE CASE

This is an ERISA case. Respondent Jimmy Weaver was working as a logger for Malcolm Rodrigues, d/b/a Rodrigues Logging, when he claims he was injured on October 6, 1990.

Rodrigues maintained an employee welfare benefit plan with Petitioner Employers Underwriters, Inc. ("Employers"). By its terms, the plan provided accidental death, dismemberment, and disability benefits for Rodrigues' employees.

Employers paid Weaver some $70,000.00 in benefits under the plan in the belief that Weaver was Rodrigues' employee. Petitioner Lisa Elliott, an employee of Employers, offered Weaver $2,700.00 as a full and final settlement of his claim. Weaver accepted this offer on October 23, 1991.

On May 13, 1992, Respondents sued Petitioners and Rodrigues in state court in Tyler County, Texas. The Respondents' state court petition, which remains their only pleading, is reproduced in full as Appendix E hereto.

Respondents alleged that Weaver was employed by Rodrigues and that he was injured in the course and scope of this employment. Thus, Respondents claimed, they was entitled under state law to benefits from Employers under the insurance coverage Rodrigues provided in connection with his plan, and Rodrigues was liable to them in common law negligence for Weaver's personal injuries, since Rodrigues was a nonsubscriber under the Texas Workers' Compensation Act. Respondents also asserted various state law claims against Employers and Elliott for fraud, bad faith, duress, and deceptive trade practices.

Petitioners timely removed the case to the United States District Court for the Eastern District of Texas on the grounds that the Respondents' claims against them were in fact grounded under ERISA even though they are phrased in terms of state law, giving the District Court jurisdiction under 28 U.S.C. § 1331 and removal jurisdiction under 28 U.S.C. § 1441(b). *See Metropolitan Life Ins.*

Co. v. Taylor, 481 U.S. 58 (1987).[1]

In their motion for remand, Respondents argued that their claims were not preempted by ERISA and that the plan was merely an attempt to sidestep the Texas workers' compensation system. They did not claim that Weaver was an independent contractor until they filed a later brief. Even then, Respondents did not amend their pleadings to claim independent contractor status.

On motion for remand, the District Court concluded that Rodrigues insurance plan was an employee welfare benefit plan under ERISA; that Respondents' claims against Petitioners were preempted by ERISA; that Jimmy Weaver was an independent contractor of Rodrigues, rather than an employee; and that, as an independent contractor, Weaver could not maintain a suit under ERISA, being neither a "participant" nor a "beneficiary" as those terms are defined in ERISA.[2]

Accordingly, the District Court dismissed Respondents' claims against Petitioners with prejudice. Since Respondents' negligence claims against Rodrigues did not implicate ERISA, they were not preempted, and the District Court remanded those claims to the state court.

Respondents appealed. On February 9, 1994, the United States Court of Appeals for the Fifth Circuit reversed and ordered the case remanded to the state court. The Court of Appeals denied a petition for rehearing on March 10, 1994.

Petitioners have filed this petition for writ of certiorari in order to prevent a pleading plainly stating a claim under ERISA from being remanded to Texas state court.

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[1] The Court of Appeals held that Respondents' claims are not preempted. Petitioners believe that this holding is erroneous, and in that belief they have filed this petition for writ of certiorari.

[2] In addition, the plan by its terms covered only employees and not independent contractors.

ARGUMENT

I. In determining that ERISA does not preempt Respondents' claims, the Court of Appeals applied a test which is inconsistent with ERISA and the prior opinions of the Supreme Court and which conflicts with the holdings of other courts of appeals.

A. The two-part test applied by the Court of Appeals is explained.

The Nature of the Problem. In this case, Jimmy Weaver filed suit claiming that he was the employee of Malcolm Rodrigues. As a result of this employment, he claimed, he was entitled to benefits under insurance provided by Petitioner Employers Underwriters, Inc. This insurance, the District Court found, was part of an employee welfare benefit plan governed by ERISA. Respondents sued Petitioners for benefits under this plan and for damages which they say they suffered because of the way Respondents handled their claim.

This would seem, therefore, to be a classic ERISA case, in which the Respondents' claims are preempted under Section 514(a) of ERISA, 29 U.S.C. § 1144(a). *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Even though the state court complaint does not refer to ERISA, Congress so completely preempted the subject matter of ERISA that such a case may nonetheless be removed to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The problem is that, contrary to his pleadings, Weaver was ***not*** Rodrigues' employee. He was, the District Court found, an independent contractor.[3]

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[3] As noted above, the Respondents later claimed that Weaver was an independent contractor in an effort to effectuate remand. *See Barraclough v. ADP Automotive Claims Services, Inc.*, 818 F.Supp. 1310, 1311-12 (N.D.Calif. 1993); *Dworkin v. Hustler Magazine, Inc.*, 611 F.Supp. 781,

The Fifth Circuit's Holding. Because of this fact, the Court of Appeals concluded that Respondents' claims for benefits and damages were not preempted, holding, **"The claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities. Therefore, such claims are not preempted."** (App. at A-7, 13 F.3d at 177)(emphasis added).

To reach this conclusion, the Court of Appeals applied a two-part test announced in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). Under this test, state law causes of action are barred only if:

> (1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries.[4]

Because Weaver was an independent contractor instead of an employee, the Court of Appeals held that he could not be a "participant" or a "beneficiary" as ERISA defines those terms. ERISA Section 3(7) & (8), 29 U.S.C. § 1002(7) & (8). Therefore, the Court of Appeals held that the Respondents' suit did not meet the second prong of the *Memorial Hospital* test and that ERISA did not preempt their claims.

B. This test and the Court of Appeals' holding are inconsistent with ERISA and prior Supreme Court

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784 (D.Wyo. 1985).

[4] In *Memorial Hospital*, the court did note, before phrasing this "test", that "finer discernments might be made. . .". 904 F.2d at 245. The court described the two factors quoted above not as prongs of a test, but as two "unifying characteristics" of cases binding in the Fifth Circuit. *Id.* In the present case, the Court of Appeals refused to make the necessary "finer discernments" and turned an element of analysis into a rigid test.

rulings.

1. Neither ERISA nor this Court employs a two-part test for preemption.

The section of ERISA preempting state laws does not, of course, employ a two-part test. Section 514(a), 29 U.S.C. § 1144(a), says that ERISA "shall supersede any and all Sate laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . ." (Emphasis added).

The scope of Section 514(a) is of "unparalleled breadth." *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 , 1147 (4th Cir. 1985), *aff'd*, 477 U.S. 901. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). "In fact . . . Congress used the words 'relate to' in § 514(a) in their broad sense." *Id.* at 98.

This Court later held that claims virtually identical to Respondents' were preempted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, the plaintiff sued for "'Tortious Breach of Contract'; 'Breach of Fiduciary Duties'; and 'Fraud in the Inducement.'" *Id.* at 43. He sought "'[d]amages for failure to provide benefits under the insurance policy in a sum to be determined at the time of trial,; '[g]eneral damages for mental and emotional distress and other incidental damages in the sum of $250,000.00,' and '[p]unitive and exemplary damages in the sum of $500,000.00.'" *Id.* at 43-44.

In this case, the claims are for fraud, bad faith, duress, and deceptive trade practices, all arising out of Petitioners' handling of the Respondents' claim for benefits. Under the holdings of *Pilot Life* and *Shaw*, these claims are preempted.

The only basis for distinguishing the Respondents' claims is that, contrary to his pleadings, Weaver was not Rodrigues' employee. Thus under the terms of the plan itself and ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Respondents had no valid claim to benefits. The Court of Appeals used the two-part test of *Memorial Hospital* to hold Respondents' claims not preempted, but

as this Court wrote in rejecting another two-part test proposed to avoid ERISA preemption, "We cannot engraft a two-step analysis onto a one-step statute." *District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580, 585 (1992). If the state laws on which Respondents base their claims "relate to" Rodrigues' plan, those laws and Respondents claims are preempted. ". . . [T]hat is the end of the matter." *Id.*

2. The Respondents' claims "relate to" the ERISA plan.

In *Shaw*, this Court noted that "[S]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n. 21. *See also, Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 833 (1988), where the Court noted that ". . . [R]un-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan[5] . . . , although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a)."[6]

In deciding whether a claim's effect on a plan is too tenuous or remote to be preempted, the lower courts have focused on whether the claim arises out of the administration of the plan. *See, e.g., Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985); *Tybout v. Karr Barth Pension Administration, Inc.*, 819 F.Supp. 371, 384

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[5] Citing a defamation case, *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986). Obviously, torts such as those alleged in *Pilot Life* are preempted.

[6] Cases finding state law claims too tenuous and remote to be preempted include: *Liberty Corp. v. NCNB Nat'l Bank*, 984 F.2d 1383, 1388-89 (4th Cir. 1993) (limitation of plan's subrogation rights under North Carolina wrongful death statute not preempted); and *Lane v. Goren*, 743 F.2d 1337, 1339-41 (9th Cir. 1984) (state anti-discrimination laws apply to employees of benefit plan).

(D.Del. 1993). Compare *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991).

One can scarcely imagine how a claim could more clearly arise out of the administration of an ERISA plan than a claim, like this one, for benefits and damages resulting from the denial of a claim. *See Shaw, supra,* and *Pilot Life, supra.*

3. ERISA does preempt the claims of nonparticipants and nonbeneficiaries if those claims "relate to" the plan.

Contrary to the Court of Appeals' holding, the claims of nonparticipants and nonbeneficiaries against an ERISA plan *are* preempted if, like the Respondents' claims, they "relate to" the plan. In categorically holding that such parties' claims are not preempted because they "do not affect the relationship between the traditional ERISA entities" (App. at A-7, 13 F.3d at 177), the Court of Appeals simply misstates the law. The courts have denied plaintiffs in many circumstances the standing to sue under ERISA. *See, e.g., Coleman v. Champion Int'l Corp.*, 992 F.2d 530 (5th Cir. 1993); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1538 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 81; *Allen v. Western Conf. of Teamsters Pension Trust Fund*, 788 F.2d 648, 649-50 (9th Cir. 1986); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986)(per curiam), *cert. denied*, 479 U.S. 916; *Yancy v. American Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); and *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied*, 474 U.S. 1006.

It is inconceivable that these plaintiffs would be allowed to proceed unhindered in state courts, pursuing damage claims phrased in terms of state law. This

> . . .would allow parties that lacked standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). This is an untenable result.

Hermann Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1290 (5th Cir. 1988)(emphasis in original). *See also, Martin v. General Motors Corp.*, 753 F.Supp. 1347, 1358 (E.D.Mich. 1991), where the court stated:

> Congress simply could not have intended to provide wider protections to persons without a colorable claim for benefits. Instead, by limiting ERISA's remedies to persons who qualify as "participants," Congress intended to deny remedies--under ERISA as well as state law--to persons without a colorable claim for benefits.

The fact that ERISA leaves a plaintiff without a remedy is irrelevant to whether his claim is preempted.[7] *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dism'd*, 113 S.Ct. 2 (1992); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989). *See also, Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1538 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 81 ("[W]e note the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy."); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 812 (1992) ("[T]he lack of an ERISA remedy does not affect a pre-emption analysis."); and *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n. 4, (1987)(interpreting Labor Management Relations Act, 29 U.S.C. § 185).

To support its holding, the Court of Appeals cited a number

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[7] One should also note that Respondents are the ones who first injected the independent contractor issue into the case. Petitioners accepted their original claim to be Rodrigues' employee. In an effort to obtain the much more generous damages allowed by Texas law, including damages for mental anquish and punitive damages, Respondents changed their position and began to argue that Weaver was an independent contractor.

of cases holding that ERISA did not preempt the plaintiffs' claims.[8] All but one of these cases consider claims by owner/employers[9] against insurance companies. Employers are expressly excluded from coverage by ERISA under the Department of Labor's regulations.[10] Since owner/employers are expressly excluded from ERISA, they cannot sue under ERISA. If express terms of their contracts with their insurance companies are to be given effect, owner/employers must be afforded their state law rights to enforce those contracts. *See, e.g., Kelly v. Blue Cross & Blue Shield*, 814 F.Supp. 220, 229 (D.R.I. 1993). None of the cited cases allows a plaintiff to modify the express terms of an ERISA plan or gives a non-employee the right to sue for benefits under a plan which by its terms only covers employees.

The one case involving an independent contractor is on its facts quite different from this one. In *Sica v. Equitable Life Assurance Soc'y of the United States*, 756 F. Supp. 539 (S. D. Fla.

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[8] *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992), *cert denied*, 113 S.Ct. 1401 (1993); *Madden v. Country Life Ins. Co.*, 835 F.Supp. 1081, 1087, (N. D. Ill. 1993); *Kelly v. Blue Cross & Blue Shield*, 814 F. Supp. 220, 230 (D.R.I. 1993); *Sica v. Equitable Life Assurance Soc'y of the United States*, 756 F. Supp. 539, 540 (S. D. Fla. 1990); *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564, 568 (E. D. Cal. 1988)(*dicta*); *Pierce v. Capitol Life Ins. Co.*, 806 P.2d 388, 390 (Colo. App. 1990); *Turnbow v. Pac. Mut. Life Ins. Co.*, 765 P. 2d 1160, 1162 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989). In *Turnbow*, the court even found that there was no ERISA plan on which to base preemption. 765 P.2d at 1161.

[9] "Employer" must be taken in the broad sense defined in ERISA Section 3(5), 29 U.S.C. § 1002(5). Thus partners (*Madden*) and sole shareholders (*Kelly*) are considered owners.

[10] "An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his spouse." 29 C.F.R. § 2510.3-3(c)(1) (1989).

1990), the plaintiff never claimed to be an employee.[11] His status as an independent contractor appears significantly clearer than Weaver's. Most importantly, whether Mr. Sica was an employee or an independent contractor, he was unquestionably covered by the insurance plan at issue. In the present case, Mr. Weaver has no coverage if he is not an employee.[12] Finally, as the Court of Appeals noted in its opinion (at note 12), the *Sica* court simply assumed that an independent contractor can maintain state common law claims. The one case it cites in support of that proposition does not so hold. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101 (5th Cir. 1990).

C. The Fifth Circuit's *Memorial Hospital* test conflicts with the holdings of other courts of appeals.

The Court of Appeals for the Fifth Circuit devised its two-part test in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). In that opinion, the court used its two-part test to hold that a third-party health care provider may sue a plan administrator for falsely representing that a patient was covered by the health benefits under an ERISA plan, thereby inducing the hospital to admit the patient, who incurred treatment costs totaling $110,829.40 for which she could not pay. 904 F.2d at 238, 245-50.

At least one other court of appeals has held to the contrary. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir.

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[11] Compare *Martin v. General Motors, supra*, holding that this Court's reasoning in *Pilot Life*, that ERISA's remedies are exclusive, "is equally applicable to remedies available to persons who *claim* to be 'participants,' . . . but, in fact are not." 753 F.Supp. at 1356-57.

[12] The courts have not looked with favor on attempts to modify the terms of ERISA plans by oral agreements. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

1991), *cert. dism'd* 113 S.Ct. 2 (1992). The Tenth Circuit has sided with the Fifth Circuit in its result, but not in its reasoning: that court's analysis focused on whether the health provider's claim effect on the plan was "too tenuous, remote, or peripheral a manner" to be preempted, without trying to impose a two-part test. *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 754 (10th Cir. 1991), quoting *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 100 n. 21. The Seventh Circuit has recognized the existence of this conflict, without deciding the issue for itself. *Decatur Memorial Hosp. v. Connecticut General Life Ins. Co.*, 990 F.2d 925, 927 (7th Cir. 1993).[13]

The Fifth Circuit itself reached a different result in *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) (*Hermann I*). There the court cited *Pilot Life, supra*, and *Metropolitan Life, supra*, and stated:

> These cases are controlling, and the hospital's attempt to distinguish them on the grounds that it is not--as were the plaintiffs in those cases--an enumerated party under § 1132(a), is unconvincing and contradictory of its position as an assignee. Adopting Hermann's position would allow parties that lacked standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). This is an untenable result.

845 F.2d at 1290.[14] (Emphasis in original). Unfortunately, this

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[13] Still other courts have given third-party providers a federal common law claim of equitable estoppel. *See, e.g., Psychiatric Institute v. Connecticut Gen'l Life Ins. Co.*, 780 F.Supp. 24,31-32 (D.D.C. 1992).

[14] The Court of Appeals attempts to distinguish *Hermann I* by stating that the plaintiff in that case did have standing. However, the court of appeals did ***not*** hold that the hospital did have standing: it held that the

"untenable result" is precisely what the Court of Appeals has allowed in this case.

II. Even if Respondents' claim was not preempted, the case was nonetheless properly removed and the District Court had jurisdiction.

As explained above, in the Statement of the Case, Respondents sued Petitioners and Malcolm Rodrigues, claiming that Jimmy Weaver was Rodrigues' employee. All of Respondents' allegations in their state court petition, which remains their only pleading, are based on Weaver's employment by Rodrigues.

While the entire pleading, reproduced as Appendix E, demonstrates that this was Respondents' claim, the following excerpts are particularly instructive:

"JIMMY WEAVER was ***employed*** by MALCOLM

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hospital would have standing if it could prove an assignment, something which the court expressly did not find, reserving that decision to the district court on remand. 845 F.2d at 1290. Thus, the language quoted above (and by the Court of Appeals in its opinion in this case, App. at A-6-7, 13 F.3d at 177) is not dictum: if the hospital's state-law claims were not preempted, as a nonparticipant and nonbeneficiary, then its possible standing as an assignee would be irrelevant. The Court of Appeals rejected the hospital's claim of non-preemption. Likewise, if Hermann Hospital could not prove that it was an assignee to the satisfaction of the district court, its claim would not "implicat[e] the relationship between the beneficiary and the ERISA plan" (App. at A-7, 13 F.3d at 178), but its claim would be preempted and barred nonetheless. 845 F.2d at 1290.

After remand to the district court, the Fifth Circuit heard a second appeal of the case in *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 959 F.2d 569 (5th Cir. 1992) ("*Hermann II*"). *Hermann II* was decided after *Memorial Hospital*; when the hospital tried to use *Memorial Hospital* as authority to allow it to assert an independent tort claim, the court of appeals refused, stating, "Hermann's argument is the same argument that we rejected in *Hermann I*." 959 F.2d at 578. The law of the case doctrine barred the hospital from asserting that argument. *Id.*

> RODRIGUES . . . as a chain saw operator." ¶ V, page A-35 (emphasis added).
>
> He was injured "in the course and scope of his ***employment*** for Defendant, MALCOLM RODRIGUES . . ." *Id.* (emphasis added).
>
> When Weaver was injured, Rodrigues "was a nonsubscriber under the Texas Workers' Compensation Act." *Id.*

Respondents sought a variety of damages in their pleading, including "adequate compensation under the terms and provisions of the policy issued to [Rodrigues] by [Employers]." ¶ VII, page A-41.

In an effort to effectuate a remand of the case to state court, the Respondents changed their position, claiming that Weaver was an independent contractor rather than an employee.[15] Despite this shift, the Respondents never amended their pleadings. Even if they had amended their pleadings, however, that would not have deprived the District Court of jurisdiction. Jurisdiction is determined in light of the original complaint, not subsequent amendments. *Brown v. Eastern States Corp.*, 181 F.2d 26 (4th Cir. 1950), *cert. denied*, 340 U.S. 864; 1A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 0.160[7] (2d Ed. 1993).

Likewise, the Respondents' attacks on the merits of their complaint will not divest the District Court of its jurisdiction. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1278 (6th Cir. 1991); *Barraclough v. ADP Automotive Claims Services, Inc.*, 818 F.Supp. 1310, 1311-12 (N.D.Calif. 1993); *Dworkin v. Hustler Magazine, Inc.*, 611 F.Supp. 781, 784 (D.Wyo. 1985). "Because plaintiff is asserting a federal claim (whether or not meritorious), defendant has a right to a federal forum. . . .Even if plaintiff's federal claim is meritless, as plaintiff now claims, defendant is entitled to have the [federal] court so determine."

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[15] This claim was not even included in the motion for remand. It first surfaced in a brief filed later.

Barraclough, supra, at 1312.

This rule is consistent with the rule that the allegations of the plaintiff's complaint are taken as true in adjudicating a motion to dismiss for want of jurisdiction under FED. R. CIV. P. 12(b)(1). *See Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 975 (7th Cir. 1989).

III. Weaver made a "colorable", if ultimately invalid, claim for ERISA benefits, and therefore the federal courts have jurisdiction to determine the merits of his suit.

The Supreme Court has held that "participant," as defined in ERISA, 29 U.S.C. § 1002(7), includes "former employees who . . . have '**a colorable claim**' to vested benefits. [Citation omitted] In order to establish that he or she 'may become eligible' for benefits, a claimant must have **a colorable claim** that . . . he or she will prevail in a suit for benefits . . . ." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (emphasis supplied), quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (*per curiam*), *cert. denied*, 479 U.S. 916 (1986), and citing *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).[16]

The Court did not define "colorable claim" in *Firestone*, but other courts have defined the term in other contexts. In *Nemeroof v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980), the court held:

> A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that fact supporting the claim *might be established*,

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[16] Although the issue in *Firestone* was who had a right to obtain plan information from a plan administrator under 29 U.S.C. § 1024(b)(4), the Fifth Circuit has recognized that *Firestone* governs standing in other ERISA cases. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-21 (5th Cir. 1992).

not whether such facts actually *had been established.*" (Emphasis in original)

Likewise, in evaluating a claim for attorney's fees under 42 U.S.C. § 1988 another court has held that "a 'colorable claim' is one that is 'arguably supported by case or ststutory law.'" *Dunn v. The Florida Bar*, 726 F.Supp. 1261, 1270 (M.D.Fla. 1988).

Whatever the definition, a "colorable" claim need not be one that will prevail on the merits. *See Garcia v. Guerra*, 744 F.2d 1159, 1166 (5th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985) (Randall, J., concurring) (claim for attorney's fees under 42 U.S.C. § 1988).

It seems plain that Weaver made a "colorable", if ultimately invalid, claim that he was an employee of Rodrigues and was entitled to benefits under Rodrigues' plan. The district court acknowledged that some of the factors set forth in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), suggested that Weaver was an employee rather than an independent contractor. Weaver actually received benefits under the Rodrigues plan as an alleged employee for some time, receiving approximately $70,000.00 in benefits. Every one Weaver's claims against Employers arises out of and directly relates to the handling of Weaver's claims for plan benefits. Each of Weaver's claims is based on the premise that he is entitled to more benefits than those already paid. Thus, when Weaver's alleged causes of action accrued, he was being treated as a participant, even if he properly was not one. He complains of his treatment - as a participant.

Someone like Weaver, who files suit, claiming to be a former employee and seeking benefits allegedly owing him under the terms of an ERISA plan, should be treated as a participant or beneficiary for the purpose of adjudicating his claim, even if he ultimately cannot prove his case. The same law should govern the merits of his claim as the claim of a true beneficiary. To have standing, as opposed to prevailing in the litigation, he should at most have to show a "colorable claim" to benefits under *Firestone*.

Indeed, rather than using "standing"--i.e., status as a "participant" or "beneficiary"--as a jurisdictional tool, the courts would better use such status simply to evaluate whether a plaintiff

made a claim asserting "substantive rights under ERISA's remedial provisions." *Martin v. General Motors Corp.*, 753 F.Supp. 1347, 1358 (E.D.Mich. 1991).[17] This approach has support in decisions of at least two courts of appeals. *See Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1278 (6th Cir. 1991); *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 979 (7th Cir. 1989); and *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 226 n. 7 (6th Cir. 1986). Certainly almost any ERISA claimant has "standing" in the traditional Article III sense of the word. *See Construction Industry Retirement Fund v. Kasper Trucking, Inc.*, 10 F.3d 465, 467 (7th Cir. 1993).

Unless one of these approaches is used in ERISA cases, the district courts will invariably face the peculiar "jurisdictional conundrum" of having jurisdiction to find in the plaintiff's favor but not against him. *See Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (9th Cir. 1983). *Cf. USAchem, Inc. v. Goldstein*, 512 F.2d 163, 170 (2d Cir. 1975) (holding that in diversity cases the amount in controversy is determined by the plaintiff's original claim and not by reference to the ultimate award).

CONCLUSION

The decision of the Court of Appeals has yielded the most incongruous result. Jimmy Weaver's suit as an employee, claiming benefits under an ERISA plan, is held not preempted by ERISA.

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[17] The cases discussing ERISA "standing" as a jurisdictional issue point to Section 502(a), 29 U.S.C. § 1132(a). But that subsection does not include the word "standing" or "jurisdiction". It purports to define "[p]ersons empowered to bring a civil action." Jurisdiction is addressed in Section 502(e), which gives state courts concurrent jurisdiction with the federal district courts over claims under Section 502(a)(1)(B) for benefits or to enforce rights under a plan.

The very pleading in which he claims he is an employee will be remanded to the Texas state courts, where Weaver will be free to assert state law claims against the plan, including claims for mental anguish and punitive damages.

Petitioners respectfully submit that this result was not intended by Congress when it enacted ERISA and that it is wholly inconsistent with the statute and the case law.

Therefore, Petitioners respectfully request that the Supreme Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, reverse the judgment of the Court of Appeals, affirm the judgment of the United States District Court for the Eastern District of Texas, and grant Petitioners such other and further relief as may be just.

Respectfully submitted,

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Jimmy WEAVER and Jeanette Weaver, Plaintiffs-Appellants,

v.

EMPLOYERS UNDERWRITERS, INC., Malcolm Rodrigues, d/b/a Rodrigues Logging, and Lisa Elliott, Defendants-Appellees.

No. 93-4153.

United States Court of Appeals, Fifth Circuit.

Feb. 9, 1994.

Appeal from the United States District Court for the Eastern District of Texas.

Before VAN GRAAFEILAND,[1] SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The district court held that certain claims by an independent contractor against his employer were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. We reverse.

I.

Malcolm Rodrigues owned an unincorporated logging business and hired Jimmy Weaver as a "saw hand" to fell timber in certain tracts of land designated to him by Rodrigues. Rodrigues would tell Weaver on what portion of land he was to cut timber,

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[1] Circuit Judge of the Second Circuit, sitting by designation.

what days he would need to work, and the time of day he should be at work. Weaver (and the other saw hands employed by Rodrigues) made the decisions as to when, where, and how to cut the timber within the tract.

When one tract was complete, Rodrigues would assign new tracts for Weaver to cut. Weaver supplied his own tools and transportation to work and hired his son to assist him. Rodrigues paid Weaver per ton of wood cut. Weaver was treated as a subcontractor for federal income tax and social security tax purposes.

Rodrigues became a member of a multiemployer benefit plan (the Southeastern Lumbermen's Association Employee Benefit Plan and Trust) that provided certain medical disability benefits to Rodrigues and his employees. Employers Underwriters, Inc. ("Employers"), was the insurance carrier obligated to pay benefits under the plan. An advertising flyer for the Southeastern Lumbermen's Plan reads in part,

SOUTHEASTERN LUMBERMEN'S
ASSOCIATION
EMPLOYEE BENEFIT PLAN
AND TRUST
FOR EMPLOYEES AND EMPLOYERS,
INDEPENDENT OPERATORS,
CONTRACTORS & CONTRACT
LABOR
AND THEIR EMPLOYEES.

It is undisputed that, by its terms, the plan covered only "covered employees," a terms defined as "a full-time employee (an Employee which works an average of at least 1 hours or more per week)."[1]

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[1] It is uncertain from the appellate record whether the plan in question had been modified especially for Rodrigues or whether each employer was subject to the same provisions.

Weaver had worked for Rodrigues only a few months before he was struck and injured by a falling tree. Because Rodrigues's payroll records listed Weaver as an "employee," Employers began paying benefits to Weaver. When Rodrigues later informed Employers that Weaver was not an employee, Employers stopped the benefit payments, then, through one of its adjusters (Lisa Elliott), negotiated a settlement agreement with Weaver whereby Weaver waived his legal claims, with the exception of his claims to medical expenses, in exchange for a lump-sum payment of $2,700.

II.

Weaver and his wife[2] brought this lawsuit against Rodrigues, Employers Underwriters, and Elliott in Texas state court, and the defendants removed. Weaver makes the following claims against one or more of the defendants: (1) violation of the Texas Deceptive Trade Practices Act--Consumer Protection Act (DTPA)[3] for false, misleading, and deceptive practices in the course of settling Weaver's claim; (2) violation of the Texas Insurance Code[4] for the allegedly gross inadequacy of the settlement offer; (3) constructive fraud by the making of material and false representations that Weaver relied upon during the course of settlement talks; (4) duress in the negotiation of the settlement agreement; (5) bad faith in denying Weaver's right as a third-party beneficiary of the insurance contract; (6) conspiracy to deceive Weaver and secure a settlement and release; (7) negligence in failing to provide a safe workplace and adequate tools; (8) negligence in failing to treat the plaintiffs in good faith and with fairness; (9) gross negligence; and (10) attorneys' fees based upon the applicable provisions of the Texas Civil Practice and Remedies Code, the Texas Deceptive Trade Practices Act, and the Texas Insurance Code.

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[2] We refer to the plaintiffs simply as "Weaver."

[3] TEX. BUS. & COM. CODE ANN. §§ 17.41 to 17.63(Vernon 1987 & 1994 Supp.).

[4] TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981 & Supp. 1994).

The district court held that (1) it had subject matter jurisdiction; (2) all of Weaver's claims, except these regarding unsafe working conditions and inadequate equipment[5], were preempted; and (3) Weaver had no standing to bring an ERISA claim. The district court dismissed Weaver's ERISA preempted causes of action and remanded his claims regarding unsafe working conditions and inadequate equipment.

Weaver argues that the Rodrigues benefit plan was intended to cover independent contractors and that the part of the plan intended to cover them was not an ERISA plan.[6] Employers argues that the plan was an ERISA plan established and maintained by Rodrigues to provide benefits to employees, that all of Weaver's claims against the plan are preempted by ERISA, and that Weaver does not have standing to sue under ERISA.

III.

A.

There are two types of employee benefit, or ERISA, plans: "employee welfare benefit plans" and "employee pension benefit plans." 29 U.S.C. § 1002(3). A "welfare benefit plan" is

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment.

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[5] Such claims include negligence and gross negligence related to unsafe working conditions and inadequate equipment as well as the claim for attorneys' fees as it relates to these causes of actions.

[6] Weaver contends further that a claim that an insurance agent induced an insured to participate in an ERISA plan that did not provide coverage for the insured is not preempted.

28 U.S.C. § 1002(1). The district court concluded that the Rodrigues benefit plan was an ERISA plan, applying the two factors set out in *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 976-78 (5th Cir.1991) ((1) whether the plan is excluded from ERISA by Department of Labor regulations and (2) whether the plan is established or maintained by an employer with the purpose of providing benefits to its employees). The district court's finding that the Rodrigues plan was an ERISA plan is a finding of fact, *id.* at 976, that we review under the clearly erroneous standard.

Weaver argues that at least part of the Rodrigues plan is not governed by ERISA because the plan was intended to benefit independent contractors as well as employees.[7] Indeed, at least one court has held that a plan can be divided into ERISA and non-ERISA portions. *Kelly v. Blue Cross & Blue Shield, 814* F.Supp. 220, 227-29 (D.R.I. 1993) (health insurance contract covering a nonemployee -- the company's owner--was not part of company's ERISA plan). If a claim is related to the non-ERISA portion of the plan, arguably it would not be preempted.

But Weaver's argument has mixed factual merit. He relies upon Rodrigues's testimony to prove that the plan was intended to cover independent contractors. Rodrigues testified that (1) he intended the plan to cover Weaver and (2) that he considered Weaver to be an independent contractor. On the other hand, Rodrigues sometimes referred to Weaver as an employee, not an independent contractor. Furthermore, the plan covers employees, not independent contractors.

Weaver's argument requires us to make a factual reckoning as to whether Rodrigues intended the plan to cover independent contractors. Even if we were to conclude that he did, we would have to

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[7] Weaver's logic is as follows: An ERISA plan exists to the extent that the plan is established or maintained for the purpose of providing benefits to employees (and beneficiaries). *See* 29 U.S.C. § 1002(1). The Rodrigues plan is intended to benefit Weaver, who is not an employee. Therefore, the Rodrigues plan is not an ERISA plan to the extent it is intended to benefit Weaver.

go further and hold that part of the plan is non-ERISA, despite the district court's finding that the entire plan is an ERISA plan. We then would have to face the issue of whether an employer's intentions alone can create a non-ERISA portion of the plan when the plain language of the plan contradicts his intentions.[8]

We find it unnecessary to reach Weaver's argument that the plan is not entirely an ERISA plan. Even if the plan is an ERISA plan in its entirety, Weaver's claims are not preempted. Therefore, for the purposes of argument, we accept the finding of the district court that the Rodrigues benefit plan is an ERISA plan.

B.

The next issue is whether ERISA preempts Weaver's claims.[9] The preemption clause in ERISA states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a).[10] State law causes of action are barred by § 1144(a) if

> (1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship between the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries.

Memorial Hosp. System v. Northbrook Life Ins. Co., 904 F.2d 236, 245 (5th Cir.1990) (footnotes omitted).

The district court found that the first *Memorial Hospital*

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[8] The court in *Kelly* did not face such an issue as the plan in Kelly expressly covered a non-employee. 814 F.Supp. at 222.

[9] Although the existence of an ERISA plan is a necessary requirement for preemption, the converse is not true. The existence of an ERISA plan does not mean that there must be ERISA preemption.

[10] The preemption clause contains two express exceptions not applicable here.

factor was present with respect to all of Weaver's claims except those related to unsafe working conditions and inadequate equipment. The court held that Weaver's claims

> address an area of exclusive federal concern, i.e., whether a claim under an ERISA EWBP [employee welfare benefit plan] was properly processed and decided, and the peripheral actions of the claims adjuster, employer, and administrator of the plan in processing and deciding the fate of the claim.

The district court also held that the second factor was present:

> Additionally, the Court notes that the claims in this case--all arising out of the manner in which the Weaver's claims for benefits were resolved--directly affect the relationship between the administrator of the plan (Employer's) and the employee.

We do not agree that the claims of an independent contractor "directly affect the relationship between the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries." Weaver is not a participant in the Rodrigues plan. ERISA defines "participant" as

> any employee or former employee of an employer, or any member of former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

After reviewing the factors listed in *Penn v. Howe-Baker Eng'rs*, 898 F.2d 1096, 1102 (5th Cir.1990),[11] the district court

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[11] These factors are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

concluded that Weaver was not an employee but an independent contractor. Weaver does not challenge this conclusion on appeal. If Weaver is not an employee, then he is not an ERISA "participant."

Nor is Weaver an ERISA "beneficiary." ERISA defines "beneficiary' as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). The parties agree the Rodrigues plan did not designate Weaver as a beneficiary; therefore, Weaver is not a "beneficiary" within the meaning of ERISA

The claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities. Therefore, such claims are not preempted. *Fugarino v. Hartford Life & Accident Ins.* Co., 969 F.2d 178, 186 (6th Cir.1992), *cert. denied*, _____ U.S. _____, 113 S.Ct. 1401, 122 L.Ed.2d 774 (1993); Madden *v. Country Life Ins. Co.,* 835 F.Supp. 1081, 1087 (N.D.III. 1993); Kelly, 814 F.Supp. at 230; *Sica v. Equitable Life Assurance Soc'y of the United* States, 766 F.Supp. 539, 640 (S.D.Fla. 1990);[12] *Dodd v. John Hancock Mut Life Ins. Co.*, 688 F.Supp. 564, 668 (E.D.Cal. 1988) *(dicta); Pierce v. Capitol Life Ins. Co.,* 806 P.2d 388, 390 (Colo.Ct.App. 1990); *Turnbow v. Pac Mut Life Ins. Co.,* 765 P.2d 1160, 1162 (Nev. 1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2468,104 L.Ed.2d 1012 (1989); *but see Martin General Motors Corp.*, 763 F.Supp. 1347, 1366 58 (E.D.Mich. 1991).

Penn, 898 E.2d at 1102 (citing *Community for Creative Non-Violence v. Reid, 490 U.S.* 730, 751-52, 109 S.Ct. 2166, 2178-79, 104 L.Ed.2d 811 (1989). The district court found that Weaver was an independent contractor in light of "Mr. Weaver's right to control the details of his work, provision of his own tools and means of transportation, the skill required of Mr. Weaver, the ability to hire his own assistants, the payment of his own Social Security and federal income tax, the method of payment, and the minimum benefits provided ...."

[12] The court in *Sica* erroneously cited *Penn*, 898 F.2d at 1101, for the proposition that an independent contractor can maintain a claim for benefits under slate common law. Upon inspection, we find that the *Penn* case does not stand for such a proposition, and thus we cannot rely upon it for authority.

Employers cites a number of cases for the proposition that claims of breach of fiduciary duty, fraud, breach of duty of good faith, denial of benefits, misrepresentation, breach of contract, etc., are preempted by ERISA. Because these cases involve claims by plan "participants,"[13] "beneficiaries,"[14] or other parties entitled to standing under ERISA,[15] they are inapposite here, where the plaintiff is none of the above.

Our opinion in *Hermann Hospital* does not militate against this conclusion. We held that a hospital, an assignee of a beneficiary's rights under an ERISA plan, had standing to sue, even though the statute limits standing to plan participants, beneficiaries, fiduciaries, and the Secretary of Labor. *See* 29 U.S.C. § 1132(a). We also held that the assignee's claims were preempted by ERISA, reasoning as follows:

> The Supreme Court recently decided that state common law claims for tortious breach of contract, breach of fiduciary duty, and fraud in the inducement, brought by a beneficiary who alleged failure to pay benefits under an ERISA-governed plan were preempted by ERISA.... These cases are

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[13] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (participant); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.* 904 F.2d 236 (5th Cir.1990) (participant); *Lee v. E.I. DuPont de Nemours & Co.* 894 F.2d 755 (5th Cir. 1990) (participants); *Ramirez v. Inter-Continental Hotels* 890 F.2d 760 (5th Cir.1989) (participant); *Powell v. Chesapeake & Potomac Tel. Co.* 780 F.2d 419 (4th Cir.1985), *cert. denied* 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986) (participant).

[14] *Hansen v. Continental Ins. Co.* , 940 F.2d 971 (5th Cir.1991) (wife named as beneficiary); *Light v. Blue Cross & Blue Shield Inc.*, 790 F.2d 1247 (5th Cir.1986) (participant and his wife, who was presumably a beneficiary).

[15] *Beaumont Neurological Hosp. v. Humana Inc.*, 780 F.Supp. 1134 (E.D.Tex.1991) (assignee of claims of patients, who were presumably participants or beneficiaries). An assignee of a beneficiary has a derivative right of standing under ERISA. *Hermann Hosp. v. MEBA Medical Benefits Plan*, 845 F.2d 1286, 1289-90 (5th Cir.1988).

> controlling, and the [plaintiff's] attempt to distinguish them on the grounds that it is not--as were the plaintiff's in those cases--an enumerated party under § 1132(a), is unconvincing and contradictory of its position as an assignee. Adopting [the plaintiff's] position would allow parties that lacked standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). This is an untenable result.

846 F.2d at 1290 (footnote and citations omitted).

Our opinion in *Hermann Hospital* could be read for the proposition that all claims against ERISA plans are preempted by ERISA even though the plaintiffs lack ERISA standing. We do not think the cited passage controls this case. First, the plaintiff in *Hermann Hospital* did have standing. *Id.* at 1289-90. Therefore, the cited passage is mere *dicta*. Second, because the plaintiff in *Hermann Hospital* stood in the shoes of a beneficiary (through an assignment of the beneficiary's claim), the plaintiff's claim implicated the relationship between the beneficiary and the ERISA plan.

By contrast, Weaver does not stand in the shoes of a beneficiary. His claim does not implicate the relationship of a beneficiary and the plan.

IV.

Because none of Weaver's claims was preempted by ERISA, the district court should have remanded all of the claims to state court without dismissing them. The judgment, accordingly, is REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4153

D.C. Docket No. 9:92CV88

JIMMY WEAVER and
JEANETTE WEAVER,

Plaintiffs-Appellants,

versus

EMPLOYERS UNDERWRITERS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

Before VAN GRAAFEILAND[1], SMITH, and WIENER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1994

ISSUED AS MANDATE: March 21, 1994

[1] Circuit Judge of the Second Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4153

JIMMY WEAVER and
JEANETTE WEAVER,

Plaintiffs-Appellants,

versus

EMPLOYERS UNDERWRITERS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING
(March 10, 1994)

Before VAN GRAAFEILAND[1], SMITH, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ J. Smith
United States Circuit Judge

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[1] Circuit Judge of the Second Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

JIMMY WEAVER, ET AL.	§	
Vs.	§	9:92cv88
EMPLOYER'S	§	
UNDERWRITERS, INC.,	§	
ET AL.	§	

MEMORANDUM OPINION AND ORDER

On this day came on to be considered the Plaintiffs' Motion to Remand. After careful consideration, the Court is of the opinion that the following order should issue.

I. FACTS

This is a case brought by a worker and his wife against his employer (Rodrigues), the insurance carrier with whom Rodrigues had contracted to cover his workers with disability and accident insurance (Employer's Underwriters, Incorporated), and an insurance adjuster who worked for the carrier (Lisa Elliot). The plaintiff originally filed this case in a Texas state district court, alleging that he was severely injured and disabled while working for Rodrigues. After the accident, the plaintiffs assert, Lisa Elliot ("Elliot") deceived them regarding the extent of their coverage and misled them into executing a settlement and release agreement. The plaintiffs --further allege that Employer's Underwriters, Incorporated ("Employer's") reasonable medical and disability benefits due under the insurance plan issued by Employer's to Rodrigues.

Based upon the above allegations, the plaintiffs bring various

pure state law causes of action[1]. Based upon these causes of action, the plaintiffs seek actual damages based upon benefits which are due under the terms of the insurance plan, damages for mental suffering, treble damages under the DTPA, additional damages under Article 21.21 of the Texas Insurance Code, punitive damages, attorneys' fees and costs, and pre-judgment interest. Employer's and Elliot's original answer contains a general denial. Rodrigues's original answer denies that he is a "person" as defined in the Texas Insurance Code, that he has any connection with the business of insurance, that an contract exists which would allow the recovery of attorneys' fees under Texas law, denies that applicable notice requirements have been met, and generally denies the plaintiffs' allegations.

The defendants have removed this case to this Court, asserting that the insurance plan which is the basis of the plaintiffs' claims is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002, *et seq.*, and that the plaintiffs' claims on the whole regard alleged unfair claims settlement practices on the part of the defendants. As a result, assert the defendants, this Court has jurisdiction under 28 U.S.C. § 1331, and the case may be removed according to 28 U.S.C. § 1441(b).[2] In response, the plaintiffs assert that Rodrigues has attempted to sidestep the Texas Worker's Compensation system "through the artifice of an ERISA plan,"[3] that "[t]his case does not substantively involve an ERISA plan, "[4] and that any causes of action alleged by the plaintiffs would exist even in the absence of ERISA. In response, the defendants

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[1] These causes of action are detailed in the discussion below.

[2] It is undisputed that there is no diversity of citizenship between the parties, and thus that a federal question is the only basis for this Court to assert subject matter jurisdiction. Thus, only if the plan in this case is an ERISA plan and the plaintiffs' claims (or some of them) are preempted by ERISA does this Court have subject matter jurisdiction.

[3] Pl. Mot. to Remand P. 2.

[4] *Id.*

assert that the insurance program at the heart of the plaintiffs' claims is an ERISA plan, thus giving this Court jurisdiction, and that the plaintiffs' claims are either preempted or that the Court has pendent jurisdiction over the non-preempted state law claims.

The instant motion gives rise to four substantive questions: (1) does this Court have jurisdiction over this case (i.e., is the insurance plan in question governed by ERISA)? (2) if the Court does have jurisdiction, are any of the plaintiffs' claims preempted by ERISA? (3) if any of the plaintiffs' claims are preempted, are the plaintiffs within the class of persons or entities entitled to bring an action under ERISA? (4) what is the proper disposition of this case, based upon the findings to the above issues? The Court addresses these issues in order below.

II. SUBJECT MATTER JURISDICTION

A. Statutory Framework

The first question to be addressed in this case is whether or not the Court has subject matter jurisdiction over this case via ERISA and the federal question statute. In order for this Court to have jurisdiction, it must first find that ERISA applies to the insurance plan issued by Employer's and purchased by Rodrigues.[5] This question was directly addressed by the United States Court of Appeals for the Fifth Circuit in the case of Hansen v. Continental

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[5] It is clear that, if the Employer's insurance plan governed by ERISA, the case may be removed by the defendants to this Court despite the lack of a substantive federal question on the face of the plaintiffs' pleadings. See Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) (holding that "Congress has clearly manifested an intent to make causes of action within the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court" despite the lack of a federal claim within the plaintiff's pleadings. Id. at 66.) It is clear that diversity of citizenship jurisdiction does not exist in this case.

Insurance Company.[6] In Hansen, the court set out a procedure for courts to follow, based upon the statutory framework of ERISA, in determining whether or not a particular insurance plan is governed by ERISA. In this analysis, the following questions must be addressed: (1) does an insurance plan exist? (2) if so, is that plan excluded from ERISA preemption by Department of Labor regulations? (3) if a plan exists but is not excluded, does the plan meet the definition of an employee benefit welfare plan fashioned by the Fifth Circuit?

B. Existence of a Plan

In determining whether or not an insurance plan exists, the Court is guided by the test first laid out by the Eleventh Circuit in Donovan v. Dillingham:[7] "[i]n determining whether a plan, fund or program...is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.[8] Attached as Exhibit "A" to the defendants' Response to Motion to Remand is the Southeastern Lumbermen's Association Employee Benefit Plan (the insurance plan in question).[9]

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[6] 940 F.2d 971 (5th Cir. 1991). This test is cited with approval in Meredith v. Time Ins. Co., 980 F.2d 382 (5th Cir. 1993.

[7] 688 F. 2d 1367 (11th Cir. 1982) (en banc). The Fifth Circuit adopted this test in Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990).

[8] Donovan, 688 F.2d at 1373; see also Hansen, 940 F.2d at 977 (quoting Donovan test).

[9] The Court notes that the Southeastern Lumbermen's Association Employee Benefit Plan appears to be a Multi-Employer Welfare Association ("MEWA"). 29 U.S.C. § 1002(40)(A). This finding, however, has no impact upon the Court's analysis of ERISA applicability. MDPhysicians & Associates, Inc. v. State Board of Ins., 957 F.2d 178, 181 (5th Cir.), cert.

By reading this document, a reasonable person could determine the intended benefits (accidental death and dismemberment and disability),[10] the beneficiaries (all employees working at least one hour a week--defined as covered employees in the plan),[11] the source of financing (employer pays initial contribution and periodic premiums)[12] and procedures for receiving benefits (employee turns in claim to and consults with Employer's).[13] Thus, the Court finds that an insurance plan exists in this case.

C. Exclusion by Regulation

Although an insurance plan may exist legally, it may be excluded from coverage by Department of Labor Regulations: "if the...plan meets the criteria set forth in the Department of Labor regulations, then ERISA does not cover that plan, and the inquiry is ended.[14] These regulations provide that the ERISA term "employee welfare benefit plan"

> shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
> (1) No contributions are made by an employer

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denied, 113 S.Ct. 179 (1992).

[10] Def. Resp. to Mot. to Remand Ex. "A" PP. 9-13.

[11] *Id.* P. 3.

[12] *Id.* P. 3, 6.

[13] *Id.* P. 7.

[14] Hansen, 940 F.2d at 976 (citing Kidder v. H & B Marine, Inc., 932 F.2d 347, 351 (5th Cir. 1991); Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1452 (5th Cir. 1991)).

or employee organization;

(2) Participation [in] the program is completely voluntary for employees or members;

(3) The sole function of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.[15]

In order for a plan to be excluded from coverage, each of the above regulatory statements must apply.[16] This particular inquiry may be quickly concluded by noting that the insurance plan itself provides that the employer shall make all required contributions,[17] and the fact that all of Rodrigues's employees are required to join the plan

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[15] 29 C.F.R. 2510.3-1(j).

[16] Hansen, 940 F.2d at 977 (citing Kidder, 932 F.2d at 351; Gahn, 926 F.2d at 1452; Memorial Hospital, 904 F.2d at 241 n. 6)).

[17] Resp. to Mot. to Remand Ex. "A" P. 3. This fact is confirmed in Rodrigues's affidavit, in which he states that he makes all contributions due under the plan and that his employees make no payments. (Resp. to Mot. to Remand Ex. "B" PP. 1-2.)

upon employment.[18] Thus, the Court finds that a plan exists, and that it is not excluded from ERISA coverage by the Department of Labor regulations.

D. Fifth Circuit Test

Although an insurance plan may exist and not be excluded from ERISA coverage by the applicable regulations, the plan must also fall within the scope of ERISA before that statute will apply.[19] ERISA applies "to any employee benefit plan if it is established or maintained...by any employer engaged in interstate commerce or in any industry or activity affecting commerce.[20] ERISA defines an "employee welfare benefit plan" ("EWBP") as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise...medical, surgical, or hospital care or benefits, or benefits in the event of sickness,

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[18] Resp. to Mot. to Remand Ex. "B" P. 2.

[19] "Whether an ERISA plan exists is a question of fact." Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1451 (5th Cir. 1991) (citing Wickman v. Northeastern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir.), cert. denied, 111 S.Ct. 581 (1990)).

[20] 29 U.S.C. §1003(a)(1) (in pertinent part). There has been no contention by any party the Rodrigues is not engaged in interstate commerce or in an activity which affects interstate commerce.

accident, disability, death or unemployment.[21] There are thus two elements to this inquiry: "first, it [the plan] must be established or maintained by an employer, and second, the employer must have a certain intent--a purpose to provide benefits to its employees."[22]

1. Established or Maintained

In determining whether an employer has established or maintained an insurance plan, "'the court should [focus] on the employer..and [its] involvement with the administration of the plan.'"[23] In short, the court is required to find "some meaningful degree of participation by the employer in the creation or administration of the plan."[24] In this case, the defendants have pointed out the following as evidence of establishment or maintenance of the insurance plan: (1) Rodrigues (and not the employees) paid the initial and regular contributions toward the plan;[25] and (2) Rodrigues forwarded to Employer's the information required on each employee as they were hired.[26] The Fifth Circuit has stated that ERISA does not govern "'bare purchases of health insurance where...the purchasing

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[21] 29 U.S.C. § 1002(1) (in pertinent part). This definition includes both EWBPs and employee pension plans, only the former of which is applicable in this case. See 29 U.S.C. § 1002(3) (discussing the terms "employee benefit plan' and "plan" as used within ERISA).

[22] Hansen, 940 F.2d at 977.

[23] Hansen, 940 F.2d at 978 (quoting Gahn, 926 F.2d at 1452).

[24] Hansen, 940 F.2d at 978.

[25] Resp. to Mot. to Remand Ex. "A" PP. 3, 6; Ex. "B" PP. 1-2.

[26] Resp. to Mot. to Remand Ex. "A" P. 5; Ex. "B" P.2.

employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.'"[27] The Fifth Circuit has also, however, held that when an employer's only connection with an insurance plan is the payment of premiums on behalf of his employees, that payment is "'substantial evidence that a plan, fund or program [was] established.'"[28]

Based upon the above reasoning, it is clear that the plan in this case was established or maintained by Rodrigues. Rodrigues was responsible for the initial and continuing contributions (premiums) under the plan, and for forwarding employee information to the plan administrator, Employer's. Rodrigues's lack of extensive administrative involvement in the plan may simply be seen as a desire to have Employer's administer and insure the plan.[29]

2. Purpose of Providing Benefits

In addition to the above, the employer must have had a purpose or intent to provide benefits to his employees. The Court finds that this element is met, first due to Rodrigues's assertion that he became a participant in order "to establish

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[27] Memorial Hospital, 904 F.2d at 242 (quoting Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208, 1211 (5th Cir. 1980), *cert. denied sub nom.* Taggarat Corp. v. Efros, 450 U.S. 1030 (1981)).

[28] Kidder, 932 F.2d at 353 (citing Donovan, 688 F.2d at 1373). In both Kidder and Memorial Hospital System, the only apparent connection between the employer and the insurance plan was the regular payment of premiums by the employer. In both cases, however the courts found that ERISA plans existed.

[29] See Memorial Hospital System, 904 F.2d at 243 (court stated that "[t]he fact that Noff's [the employer] administrative functions under the plan are minimal is perfectly in keeping with its intent that Northbrook [the plan administrator] administer the plan as well as insure it").

and maintain an Employee Benefit Plan pursuant to which certain medical benefits and disability benefits would be provided to all my employees for certain accidental injuries."[30] Secondly, the Southeastern Lumbermen's Association adopted the plan (which provides for disability and accident coverage) with the stated purpose of "creat[ing] an employee benefit plan for the benefit of eligible employees of participating members in the SLA."[31]

Based upon the fact that the Court has found above that an insurance plan exists in this case, that it is not excluded from ERISA coverage by Department of Labor regulations, and that it meets the criteria in the ERISA EWBP definition, the Court also finds that the plan involved is an ERISA plan.

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[30] Resp. to Mot. to Remand Ex. "B" P. 1.

[31] Resp. to Mot. to Remand Ex. "A" P. 2. The plaintiffs argue that Rodrigues's intent is not to benefit the employee, but to have an insurance plan to his detriment. This assertion is based upon the alleged meager nature of the Employer's plan benefits compared to those provided by the Texas statutory worker's compensation system. (Pl. Mot. Remand P. 2-3.) The Court finds that this argument is without merit, first because it is entirely legal for employers in Texas not to subscribe to the Texas worker's compensation system (in return for which they surrender certain common-law defenses). TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon 1967). Second, the Court finds that measuring the intent of the employer based upon what other potential benefits the employees might have received under another statutory or nonstatutory plan or program is illogical. To do so would mean that, as long as an employee could point out a plan with more benefits to the employee, the employer would be deemed not to have adopted an EWBP, regardless of the extent of benefits provided under the plan actually adopted by the employer. This argument is contrary to both the terms of the statute and the majority of the cases which have interpreted it.

III. PREEMPTION OF THE PLAINTIFF'S CLAIMS

A. Scope of Preemption Under ERISA

The broad preemption provision within ERISA states that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[32] Determining whether a particular cause of action is preempted is a matter of finding congressional intent, and in this vein the Supreme Court has noted "that the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan [and EWBP] regulation as exclusively a federal concern.'"[33] In interpreting the "relate to" language of the preemption clause, the Supreme Court has stated that the phrase is"given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'"[34] Further, "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."[35]

In analyzing the above language, the Fifth Circuit has set forth two factors which unite cases finding that preemption applies:

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[32] 29 U.S.C. § 1144(a) (in pertinent part). There are express exceptions to the preemption clause, none of which apply in this case.

[33] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

[34] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 97 (1983)).

[35] Metropolitan Life Ins. Co., 471 U.S. at 39 (citing Shaw, 463 U.S. at 98-99)).

"(1) the state law claims address areas of exclusive federal concern such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship between the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries."[36] The Fifth Circuit has noted that "[t]he determination that [an insurance plan] is an ERISA plan is tantamount to a determination that [the plaintiff's] state law causes of action are barred."[37]

B. The Plaintiffs' Claims in This Case

The plaintiffs bring the following claims in this case:

(1) against all three defendants under the Texas Deceptive Trade Practices Act ("DTPA") for false, misleading and deceptive practices in the course of settling Mr. Weaver's claim;

(2) against all defendants based upon the Texas Insurance Code Article 21.21, Section 16, alleging gross inadequacy of the settlement offer from Elliot and Employer's;

(3) constructive fraud on the part of all three defendants in making material, false representations which the plaintiffs relied upon during the course of the settlement talks;

(4) duress upon all the defendants' part in seeking to have the Weavers execute the release and settlement;

(5) bad faith against all three defendants, alleging that Jimmy Weaver was a third-party beneficiary of the insurance contract between Rodrigues and Employer's;

(6) conspiracy against all defendants in acting to deceive the plaintiffs and secure a settlement and release;

(7) negligence on Rodrigues's part in failing to provide a safe workplace and adequate tools;

(8) negligence on the part of Employer's and Elliot in

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[36] Memorial Hospital System, 904 F.2d 236 (citations omitted).

[37] Hansen, 940 F.2d at 979.

failing to treat the plaintiffs with good faith and fairness;

(9) gross negligence on the part of all the defendants in dealing with the plaintiffs; and

(10) attorney's fees based upon applicable provisions of the Texas Civil Practice and Remedies Code, the DTPA, and the Texas Insurance Code.

In analyzing the potential preemption of the plaintiffs' claims, the Court notes that the general character of the plaintiffs' state court petition is one seeking damages for unfair claims settlement practices. In essence, what the plaintiff alleges is that, in the course of determining the amount of benefits to which Mr. Weaver would be due, the defendants mislead the plaintiffs and misrepresented facts, causing the plaintiffs to execute release and settlement agreements.

C. Scope of Preemption in This Case

After careful consideration, the Court is of the opinion that all of the above causes of action, except for the negligence and gross negligence causes of action against Rodrigues alone forfailure to provide a safe workplace and adequate tools, and the claim for attorneys' fees on those causes of action, are preempted by ERISA.[38] In support of this finding, the Court notes under the Memorial Hospital System test that the claims first address an area of exclusive federal concern, i.e., whether a claim under an ERISA EWBP was properly processed and decided, and the peripheral actions of the claims adjuster, employer, and administrator of the plan in processing and deciding the fate of the claim. Congressional intent in enacting ERISA--a decisive factor in determining whether preemption applies--was largely to "protect the interests of employees and their beneficiaries in employee benefit plans."[39] By finding that

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[38] These non-preempted claims are found in paragraphs "E," "F," and "G" of the Plaintiffs' Original Petition.

[39] Memorial Hospital System, 904 F.2d at 247.

finding that preemption occurs in this case, the Court furthers the "advantages of a uniform set of regulations governing plan fiduciary responsibilities and governing procedures for processing claims and paying benefits."[40] Additionally, the Court notes that the claims in this case--all arising out of the manner in which the Weaver's claims for benefits were resolved--directly affect the relationship between the administrator of the plan (Employer's) and the employee. Due to the broad form of the allegations, those claims also implicate the employer, Rodrigues. Thus, the Court finds that the claims of the plaintiffs (aside from the Rodrigues negligence and gross negligence claim and the dependent attorneys' fee claim) are preempted under the analysis set forth in Memorial Hospital System.

In addition to the above, the Court notes the following cases in support of its finding: Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (individual plaintiff sued plan administrator alleging breach of contract and fiduciary duty and fraud in the inducement; court found that the claims were for improper processing of a claim and found preemption to apply); Hogan v. Kraft Foods, 969 F.2d 142, 144-145 (5th Cir. 1992) (former employee and wife sued employer and plan administrator based upon ERISA, breach of contract, Texas Insurance Code Art. 21.21, the DTPA, breach of good faith and fair dealing, negligence, and intentional infliction of emotional distress, alleging that their rights under the plan had been denied; court found that all the state law claims were based upon the failure of the plan to make a payment and were preempted); Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 764 (5th Cir. 1989) (individual plaintiff sued to recover benefits he alleged were improperly denied based upon, *inter alia,* the Texas Insurance Code Article 21.21; court found the provision preempted); Boren v. N.L. Industries Inc., 889 F.2d 1463, 1466 (5th Cir. 1989)(individual plaintiff sued employer and plan administrator to recover benefits based upon breach of contract, the DTPA, negligence and the Texas Insurance Code; court found preemption based upon the fact that plaintiff was "relying on state law to advance his complaint that his

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[40] ID. at 245.

benefits under the plan were terminated"); Cefalu v. B. F. Goodrich Co., 871 F.2d 1290, 1295 (5th Cir. 1989) (individual plaintiff sued employer based oral representations regarding the extent of benefits under a pension plan; court held that the damages would necessarily be measured by the terms of the benefit plan and that the breach of contract claim was preempted).[41]

In contrast to the above, the Court finds that the plaintiffs' claims regarding the negligence of Rodrigues in failing to provide a safe place to work and adequate equipment, and gross negligence in those actions, and seeking attorney's fees for those legal claims, are not preempted. In contrast to the above (preempted) claims, these state law claims have no relation to the EWBP in issue, and could be brought even if no insurance plan existed at all. Thus, these are the sole state law claims to survive preemption in this case.

IV. A PROPER PLAINTIFF

A. Proper Plaintiffs Under ERISA

Having found that the plaintiffs' state law claims are largely preempted under ERISA, the next inquiry is whether or not the plaintiffs have standing to sue under ERISA. ERISA itself provides that there are four types of plaintiffs who may bring a civil enforcement action: participants, beneficiaries, the Secretary, or a

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[41] The Court would note that "ERISA's preemption provision bars state law causes of action even though such preemption may leave a victim of fraud or misrepresentation without a remedy." Hansen, 94Q -F.2d at 979 (citing Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 757 (5th Cir. 1990); Straub v. Western Union Tel. Co., 851 F.2d 1262, 1265-1266 (10th Cir. 1988); Northwest Administrators, Inc. v. B.V. B.R., Inc., 813 F.2d 223, 226-227 (9th Cir. 1987); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986)).

fiduciary of a plan.[42] In this case, obviously, the plaintiffs are potentially only participants or beneficiaries. For the purposes of this inquiry, "participant" is defined as "any employee or former employee of an employer."[43] "Employee" is cryptically defined within ERISA as "any individual employees by an employer."[44] A "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[45] In the instant case, the question has arisen whether or not Mr. Weaver is an employee or an independent contractor.[46] Thus, the key inquiries in this case (raised by the plaintiff) are: (1) whether Mr. Weaver is an employee of Rodrigues, so as to enable him to be a participant and have standing to sue, and to enable him to name Mrs. Weaver as a beneficiary; and (2) whether either of the plaintiffs have been designated as beneficiaries under the terms of the plan.

B. "Employees" Under ERISA

The question of whether a particular person is an "employee" (and therefore potentially a participant) under ERISA "is a question

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[42] 29 U.S.C. § 1145(a). See also Hermann Hospital v. MEBA Medical & Benefits Plan, 845 F.2d 1286 (5th Cir. 1988) (finding that only enumerated parties had standing to sue under ERISA).

[43] 29 U.S.C. § 1002(7)-

[44] 29 U.S.C. § 1002(6).

[45] 29 U.S.C- § 1002(8).

[46] The plaintiffs argue that Weaver is an independent contractor, while the defendants argue that he is an employee under ERISA.

of law involving the interpretation of ERISA."[47] In deciding this question of law, the Court is constrained to apply the federal common law of agency.[48] The courts have listed a number of factors to consider in this inquiry, listed below (followed by analysis of the instant facts):

1. "the employer's right to control the manner and means by which the work product is accomplished:"[49] in this case, Mr. Weaver worked felling timber in certain tracts of land designated to him by Rodrigues. Rodrigues had a number of "saw hands," and each would receive an assignment of what portion of land upon which they were to cut timber. Rodrigues told Mr. Weaver the dates upon which he would need to work and the time to be at work.[50] Nevertheless, Mr. Weaver (and the other saw hands employed by Rodrigues) made the decisions as to when, where, and how to cut the timber within the tract without input from Rodrigues.[51] Thus, although Rodrigues made the decisions as to which tracts to cut, the manner and means regarding the execution of the job were decided by Weaver.

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[47] Penn v. Howe-Baker Enqineers, Inc., 898 F.2d 1096, 1101 (5th Cir. 1990).

[48] Id. at 1101-1102.

[49] Id. at 1102 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989) (citations omitted)).

[50] Defendants' Second Supp. Brief in Supp. of Resp. to Pl. Mot. to Remand P. 4.

[51] Pl. Supp. Brief and Evid. in Support of Pl. Mot. to Remand Ex. "B" PP. 124-127.

2. "the skill required:"[52] the parties do not directly address this issue, though it appears that a specialized knowledge of tree cutting would be required for the type of work performed by Mr. Weaver.

3. "the source of the instrumentalities and tools:"[53] Mr. Weaver supplied his own tools and his own way to work.[54]

4. "the location of the work:"[55] the location of the work differed, according to the tract of land which would needed to be cut.

5. "the duration of the relationship between the parties:"[56] Apparently, although Mr. Weaver worked exclusively for Rodrigues, he only worked a few months before he was allegedly injured.[57]

6. "whether the hiring party has the right to assign additional projects to the hired party:"[58] Rodrigues would assign tracts of forest for Mr. Weaver to cut,

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[52] See note 4 9, supra.

[53] *Id.*

[54] Pl. Supp. Brief and Evid. in Supp. of Mot. to Remand Ex. "A" P. 19.

[55] See note 49, supra.

[56] *Id.*

[57] Defendants Second Supp. Brief in Supp. of Resp. to Pl. Mot. to Remand P. 27. The Court would note that the parties themselves defined Mr. Weaver's status as subcontractor and not as employee. (Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "A" PP. 18-20; Ex. "B" P. 123.)

[58] See note 4 9, supra.

and would assign new projects, or tracts, when the previous tract was complete.[59]

7. "the extent of the hired party's discretion over when and how long to work:"[60] this factor was not directly addressed by the parties, but it appears that Mr. Weaver would work full time until a particular tract was cleared, then would move to a new tract as assigned by Rodrigues.

8. "the method of payment:"[61] Mr. Weaver was paid by the load, i.e., per ton of wood cut, as were all the saw hands paid by Rodrigues.[62]

9. "the hired party's role in hiring and paying assistants:"[63] Mr. Weaver hired his son as an assistant, and thus it may be inferred that he had the responsibility and capacity to do so.[64]

10. "whether the work is part of the regular business of the hiring party:"[65] Rodrigues was in the business of cutting and hauling lumber, and thus the type of work Mr. Weaver was doing was part of Rodrigues's regular business.

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[59] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 125.

[60] See note 49, supra.

[61] *Id.*

[62] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 25.

[63] See note 49, supra.

[64] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" PP. 33-34.

[65] See note 49, supra.

11. "whether the hiring party is in business:"[66] Mr. Rodrigues was in the business of logging, as stated above.

12. "the provision of employee benefits:"[67] apparently, the only benefits provided were accident and disability insurance, through the Employer's plan in question.[68]

13. "the tax treatment of the hired party:"[69] Rodrigues did not withhold money from Mr. Weaver's payment for Social Security or federal income tax.[70] As a subcontractor, Mr. Weaver was responsible for paying any federal taxes due upon his payments from Rodrigues.[71]

After careful consideration of the above factors, the Court finds that Mr. Weaver was an independent contractor, and not an common law. Although certain of the above factors weigh in favor of employee status, others (especially Mr. Weaver's right to control the details of his work, provision of his own tools and means of transportation, the skill required of Mr. Weaver, the ability to hire his own assistants, the payment of his own Social Security and federal income tax, the method of payment, and the minimal benefits provided) weigh heavily in favor of independent contractor status. Because the definition of the term "participant" is based upon the party being an employee, Mr. Weaver cannot qualify as a participant within the meaning of ERISA. In light of this, the Court finds that Mr. Weaver is without standing to sue as a participant under ERISA, and cannot designate

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[66] *Id.*

[67] *Id.*

[68] Affid. of Roel Nabors, president of Employer's (stating that Mr. Weaver was on Rodrigues's payroll and thus, under the terms of the plan, was a covered employee).

[69] See note 49, supra.

[70] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "A" P. 18.

[71] Pl. Supp. Brief and Evid. in Supp. of Pl. Mot. to Remand Ex. "B" P. 124.

his wife as a beneficiary.

C. Beneficiary Status

Even if Mr. Weaver does not qualify as a participant based upon the above finding that he was not an employee, under ERISA he and Mrs. Weaver may still qualify as beneficiaries if they are designated by the Southeastern Lumbermen's Association Employee Benefit Plan as such.[72] The parties in this case agree that the plan does not designate either of the plaintiffs as beneficiaries,[73] and thus the plaintiffs are without standing to sue in this case based upon ERISA.

V. DISPOSITION OF THE STATE LAW CLAIMS

Because only state-law claims have survived preemption in this case, and because the plaintiffs are without standing to sue under ERISA, the Court must determine whether to remand the case to the state court from which it was removed or to retain jurisdiction over the state law claims.[74] The removal statute provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall

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[72] 29 U.S.C. § 1002(8).

[73] Pl. Resp. Brief in Compliance with the Court's Order PP. 4-5. The only coverage in the Employer's plan is provided for "covered employees," a term which is defined as "a full-time employee (an Employee which works an average of at least 1 hours or more per week) of a Participating Employer." (Resp. to Pl. Mot. to Remand Ex. "A" P. 3.) Thus, neither Mr. Weaver nor Mrs. Weaver could have status as a named beneficiary aside from an employee status.

[74] The parties have briefed the issue of the correct course of action to take if the plaintiffs were found to be without standing. Apparently, however, none of the parties anticipated that a state law cause of action might survive preemption, but that the plaintiffs would be without standing to bring an ERISA cause of action, thus leading to the instant quandary.

be remanded."[75] In light of this statute, the Court is constrained to remand the plaintiffs' negligence cause of action to state court for disposition.[76]

V. CONCLUSION

In the Plaintiffs' Motion to Remand, the Court has been faced with four principal questions: (1) whether the Court has subject matter jurisdiction over this case (i.e., whether the insurance plan involved is governed by ERISA); (2) whether, if the Court does have subject matter jurisdiction, any of the plaintiffs' claims preempted by ERISA; (3) whether, if any of the plaintiffs' claims are preempted, the plaintiffs within the class of persons or entities entitled to bring an action under ERISA; and (4) the proper disposition of the case based upon the above findings. Having found that the insurance plan involved is an ERISA plan, the Court has determined that it does have jurisdiction over this case and thus that it was properly removed. Further, The Court finds that the bulk of the plaintiffs' claims are related to an employee welfare benefit plan, and thus preempted by the terms of ERISA. This finding, however, is without much force, as the Court further finds that the plaintiffs have no standing to bring an ERISA claim, and thus that the ERISA cause of action must be dismissed. This dismissal thus deprives the Court of subject matter jurisdiction, and requires that the remaining state law negligence, gross negligence and dependent attorneys' fees causes of action be remanded. It is, therefore,

ORDERED that all of the plaintiffs' claims (except those alleging negligence, gross negligence and attorney's fees in relation to the alleged failure of Rodrigues to provide a safe place to work and adequate equipment) are DISMISSED WITH PREJUDICE, as they are preempted by ERISA and the plaintiffs lack standing to sue under that statute. It is,

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[75] 28 U.S.C. § 1447(c) (in pertinent part). See International Primate Protection League v. Tulane Educ. Fund, 111 S.Ct. 1700, 1709-1710 (1991) (citing terms of § 1447(c) to hold that remand was required where district court was without jurisdiction and case was improperly removed); Estate of Rains v. Dinges, 769 F.Supp. 353, 354 (D.Kan. 1991) (court held pursuant to § 1447(c) that case had to be remanded where all federal question claims had been resolved).

[76] In remanding this action, the Court states no opinion as to the viability of the plaintiffs' non-preempted state law claims.

further,

ORDERED that the Plaintiffs' Motion to Remand is GRANTED. It is, further,

ORDERED that this case is REMANDED to the District Court of Tyler County, Texas for further proceedings, due to lack of subject matter jurisdiction in this court and pursuant to 28 U.S.C. § 1447(c). It is, further,

ORDERED that all pending motions aside from the Plaintiffs' Motion to Remand are denied.

SIGNED this 27th this day of January, 1993.

/S/ William M. Steger
UNITED STATES
DISTRICT JUDGE

CAUSE NO. 14,383

JIMMY WEAVER, ET UX JANNETTE WEAVER	§	IN THE DISTRICT COURT
VS.	§	FOR
EMPLOYER'S UNDER-WRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, AND LISA ELLIOTT	§	TYLER COUNTY, TEXAS ____ JUDICIAL DISTRICT

PLAINTIFFS ' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, JIMMY WEAVER and JANNETTE WEAVER, hereinafter referred to as "Plaintiffs," complaining of and against EMPLOYER'S UNDERWRITERS, INC., Defendant, an Alabama Corporation, MALCOLM RODRIGUES, Individually and d/b/a RODRIGUES LOGGING, Defendant, and LISA ELLIOTT, Defendant, and would show the Court as follows:

I.
PLAINTIFFS

Plaintiffs are residents of Tyler County, Texas.

II.
DEFENDANTS

Defendant, EMPLOYER'S UNDERWRITERS, INC., may be served with process through its registered agent, C. T. Corporate Systems, at 350 N. St. Paul Street, Dallas, Texas 75201. Defendant, MALCOLM RODRIGUES, may be served with process at P.O. Box 631396, Nacoqdoches, Texas 75963 and Defendant, LISA ELLIOTT,

may be served with process at P. O. Drawer B, Decatur, Alabama 35602-9002.

III.
VENUE

Venue is proper in Tyler County, Texas pursuant to Section 15.032 of the Texas Civil Practices and Remedies Code.

IV.
DEFINITIONS AND STATUTORY ASSERTIONS

Plaintiffs are "consumers" as defined in the Texas Business and Commerce Code, Section 17.45(4), a part of the Deceptive Trade Practices Consumer Protection Act, hereinafter referred to as "DTPA."

Plaintiffs and Defendants are "persons" as that term is defined under DTPA, Section 17.45(3).

The term "knowingly" as used herein shall mean actual awareness of the falsity, deception or unfairness of the Act or practice giving rise to the Plaintiffs' Claim. In this regard Plaintiffs would show that the acts or practices of the Defendants complained of herein and as hereinafter alleged were committed "knowingly."

"Unconscionable action or course of action" as used herein shall mean an act or practice, which to a person's detriment takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree. In this regard, Plaintiffs would show that the acts or omissions of the Defendants as herein stated constitute an unconscionable action or course of action.

The "acts or omissions" hereinafter alleged were taken or made on behalf of Defendants by and through their respective duly authorized agents, servants or employees within the course and scope of their employment.

Defendants are "persons" as that term is defined in Article 21.21, Section 2(a), of the Texas Insurance Code.

The term "knowingly" as used herein shall also mean actual awareness of the falsity, deception or unfairness or deception of the

act or practice made the basis for a claim for damages under Section 16 of Article 21.21 of the Texas Insurance Code.

Plaintiffs are persons entitled to seek relief under Section 16 of Article 21.21 of the Texas Insurance Code, Unfair Competition and Unfair Practices.

Plaintiffs have complied with notice provisions of the Texas Civil Practice and Remedies Code, Section 38.002.

In addition to all other allegations, Plaintiffs assert that Article 38.001 of the Texas Civil Practice and Remedies Code is applicable to this case under the theory of implied contract.

V.

FACTS

Plaintiff, JIMMY WEAVER, was employed by MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING as a chain saw operator. On or about October 6, 1990 while he was working in the course and scope of his employment for Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, Plaintiff, JIMMY WEAVER, was struck in the back and neck by a falling tree causing him to be totally and permanently disabled and causing him injury, damage and loss. Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, maintained accident and disability insurance coverage for the benefit of his employees including Plaintiff, JIMMY WEAVER, with the Defendant, EMPLOYER'S UNDERWRITERS, INC. At the time Plaintiff, JIMMY WEAVER, sustained the aforementioned injuries, the Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, was a nonsubscriber under the Texas Workers' Compensation Act.

On or about October 23, 1991 LISA ELLIOTT, acting in the course and scope of her agency or employment for Defendant, EMPLOYER'S UNDERWRITERS, INC., in order to induce Plaintiffs to release her employer, the Defendant, EMPLOYER'S UNDERWRITERS, INC., made false, misleading and deceptive representations to Plaintiffs, including, but not limited to, a representation that "$2,700.00 was all the money that Plaintiffs were going to receive. Deceived by the representations made to them by

the said LISA ELLIOTT, Plaintiffs executed the Settlement Agreement, Exhibit A hereto. Since the execution of the Settlement Agreement, Exhibit A hereto, by Plaintiffs on October 23, 1991, Defendant, EMPLOYER'S UNDERWRITERS, INC., has refused to pay the reasonable expense incurred by Plaintiff, JIMMY WEAVER, for the medical care necessary as a result of his injury on October 6, 1990. In addition, since October 23, 1991 Defendant, EMPLOYER'S UNDERWRITERS, INC., has refused to pay to Plaintiffs the disability benefits due Plaintiffs under the contract of insurance issued by Defendant, EMPLOYER'S UNDERWRITERS, INC., to Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, for the benefit of his employees including Plaintiff, JIMMY WEAVER.

VI.

CAUSES OF ACTION

Plaintiffs hereby incorporate all previous factual allegations in the following statement of their causes of action:

A. DTPA AND UNFAIR COMPETITION AND UNFAIR PRACTICES ALLEGATIONS

Defendants, EMPLOYER'S UNDERWRITERS, INC., and LISA ELLIOTT, in representing to Plaintiffs that $2,700.00 was all of the money that they were ever going to receive and that if they took their claims for the injury of Plaintiff, JIMMY WEAVER, to court, they would not receive more than $2,700.00 and might receive much less were false, misleading and deceptive acts and practices, specifically violating DTPA Section 17.46 et seq in various respects. Plaintiffs would show that the acts or practices of Defendant, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES and LISA ELLIOTT as herein alleged were committed "knowingly." Plaintiffs would further show that the acts and omissions of these Defendants were and are a producing cause of damages to Plaintiffs. Plaintiffs would further show that Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT as set forth above engaged in actions, or in a course of action which

constituted an "unconscionable action or course of action" for which Plaintiff is entitled to recover damages under DTPA Section 17 . 50 and for which damages Plaintiffs sue. Further, by virtue of violation of various provisions of DTPA Section 17.46 by Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, Plaintiffs are entitled to recover under the provisions of Article 21.21, Section 16, Texas Insurance Code, for which additional relief Plaintiffs herein sue. Settlement offer made Plaintiffs by Defendants was grossly inadequate in the circumstances and each of Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, were aware of the inadequacy of the settlement offer and the deception inherent in its offer to Plaintiffs in the circumstances that then existed.

B. CONSTRUCTIVE FRAUD ALLEGATIONS

When Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, represented to Plaintiffs that unless Plaintiffs accepted Defendants' offer of settlement in the amount of $2,700.00 Plaintiffs would in all probability receive nothing or far less than the $2,700.00 offered, Defendants fully intended that Plaintiffs would rely upon these representations to Plaintiffs' detriment and the advantage of Defendants. Defendants knew that the sum of $2,700.00 was grossly unfair in the circumstances and represented to Plaintiffs that the sum was fair and adequate and all that they would receive and that they might receive much less in order to induce Plaintiffs to accept $2,700.00 in settlement of all of their claims and causes of action against Defendants. Plaintiffs would show that the representations by Defendants were material and false and as a result of their reliance upon such representations Plaintiffs have been damaged as hereinafter alleged. Plaintiffs would show that the acts and omissions of Defendants as alleged in this paragraph constitute actionable fraud for which Plaintiffs are entitled to recover their damages as herein alleged. Each of the Defendants was aware of the inadequacy of the settlement offer and of the deception inherent in its presentation to

Plaintiffs. Each of the Defendants knew, or should have known by the exercise of ordinary care, about the deceptions being practiced upon Plaintiffs by the other Defendants.

C. DURESS

Plaintiffs would show that the action of Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, in representing that the $2,700.00 offer was a fair offer and that unless said sum was accepted by Plaintiffs, Plaintiffs would receive far less, if anything at all at a time when Plaintiffs were financially destitute, were uneducated and were without legal representation in a matter having vast legal implications for them created an imbalance of bargaining power between Plaintiffs and Defendants. As a result of the acts and omissions described herein, Defendants have employed extortionate measures in obtaining Plaintiffs' agreement to settle their claims and causes of action against Defendants for $2,700.00. Plaintiffs would show that the implied threat made by Defendants against Plaintiffs that unless Plaintiffs accepted the $2,700.00 they would receive little, or nothing at all, Eor their claims for the serious bodily injury of Plaintiff, JIMMY WEAVER, destroyed Plaintiffs' free agency, if any they had. Plaintiffs would show that the acts and omissions of Defendants as alleged herein constitute duress, economic coercion and business compulsion which have damaged Plaintiffs as hereinafter alleged. Each of Defendants was aware of the inadequacy of $2,700.00 in exchange for all of the claims and causes of action against Defendants possessed by Plaintiffs as the result of the injury of Plaintiff, JIMMY WEAVER, on October 6, 1990. Each of Defendants knew, or should have known, by the exercise of ordinary care about the duress being practiced upon Plaintiffs by the other Defendants in this action.

D. BAD FAITH ALLEGATIONS

Plaintiffs would show that Plaintiff, JIMMY WEAVER, was a third party beneficiary of a contract between Defendant, EMPLOYER'S UNDERWRITERS, INC. and Defendant, MALCOLM RODRIGUES, so that Defendant, EMPLOYER'S

UNDERWRITERS, INC., owed to Plaintiff, JIMMY WEAVER, the duty of good faith and fair dealing. Defendants, EMPLOYER'S UNDERWRITERS, INC. and LISA ELLIOTT, in dealing with Plaintiffs as described herein breached the duty of good faith and fair dealing owed to Plaintiffs by Defendant, EMPLOYER'S UNDERWRITERS, INC., its agents, servants and employees including, but not limited to, Defendant, LISA ELLIOTT. Failure by Defendants to deal with Plaintiffs in good faith and with fairness was a producing cause of injury, loss and damage to Plaintiffs, all as hereinafter more specifically alleged. Defendants knew, or should have known by the exercise of ordinary care, of their duty to deal with Plaintiffs in good faith and with fairness and additionally knew, or should have known, by the exercise of ordinary care of the inadequacy and inherent deception of an offer of $2,700.00 for settlement of all of the claims and causes of action of Plaintiffs against Defendants. Each Defendant knew, or should have known by the exercise of ordinary care about the breach by the other Defendants of the duty of good faith and fair dealing owed Plaintiffs by Defendants.

E. CONSPIRACY ALEEGATIONS

Plaintiffs would show that Defendants, and each of them, acted in active concert with respect to the acts and omissions described herein and are jointly and severally liable to Plaintiffs for Plaintiffs' damages, as hereinafter set forth. Each of the Defendants was aware of the inadequacy of the settlement offer and of the deception inherent to such an offer to Plaintiffs in the then existing circumstances. Each Defendant knew, or should have known by the exercise of ordinary care, about the inherently deceptive misleading practices being utilized against Plaintiffs by the other Defendants.

E. NEGLIGENCE

Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, failed to provide Plaintiff, JIMMY WEAVER, a safe place in which to work and failed to provide Plaintiff, JIMMY WEAVER, equipment adequate to insure his safety in the workplace which failures were negligence and were proximate causes of

Plaintiffs' injury, losses and damages.

Defendants, EMPLOYER'S UNDERWRITERS, INC. and LISA ELLIOTT, failed to deal with Plaintiffs in good faith and with fairness which failure was negligence and was a proximate cause of Plaintiffs' injuries, losses and damages.

F. GROSS NEGLIGENCE

Defendants' acts and omissions as described herein amount to more than momentary thoughtlessness, inadvertence, or error in judgment and establish an entire want of care on the part of Defendants so as to establish that Defendants' acts and omissions in dealing with Plaintiffs were the result of actual conscious indifference to the rights, welfare and safety of Plaintiffs and of Plaintiff, JIMMY WEAVER in particular. Alternatively, Plaintiffs would show that Defendants, and each of them, acted intentionally and with malice to deprive Plaintiffs of their claims and causes of action against Defendants.

In breaching their implied duty to deal with Plaintiffs in good faith and with fairness Defendants, and each of them, acted with fraud, oppression and malice. Plaintiffs are therefore entitled to recover an amount that the Jury may in its discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that the Jury may have found as actual damages.

G. ATTORNEY FEE ALLEGATIONS

As a result of the acts of Defendants as set forth herein Plaintiffs have been required to employ the undersigned attorneys and have agreed to pay the undersigned attorneys a reasonable fee for their services in bringing this litigation, including all reasonable and necessary out-of-pocket expenses. Plaintiffs are entitled to recover from Defendants, jointly and severally, their reasonable attorney's fees and costs of court in the prosecution of this action, pursuant to Provisions of Section 38.001 et seq, Texas Civil Practice and Remedies Code, DTPA, Section 17.50 and Texas Insurance Code, Article 21.21, Section 16.

VII.
DAMAGES

As a result of the acts and omissions as hereinabove alleged, Plaintiffs have been damaged in the following sums, for which sums Plaintiffs hereby sue:

I. For Plaintiffs' actual damages, being a sum of not less than One Million Dollars, being the difference between the amount of $2,700.00 and the amount Plaintiffs allege to be adequate compensation under the terms and provisions of the policy issued to Defendant MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, by Defendant, EMPLOYER'S UNDERWRITERS, INC.; and the loss of income that would have been generated from an adequate settlement;

II. For mental suffering, pain and anguish in a sum of not less than Five Hundred Thousand Dollars;

III. For treble damages as provided by DTPA, Section 17. 50;

IV. For the additional damages provided by Article 21.21, Section 16 of the Texas Insurance Code;

V. For punitive damages of not less than One Million Dollars;

VI. For mental anguish in an amount of Five Hundred Thousand Dollars;

VII. For Plaintiffs' reasonable and necessary attorneys fees and costs of court as provided in Texas Civil Practice And Remedies Code, Section 38.001, et seq, DTPA, Section 17.50 and Article 21.21, Section 16 of the Texas Insurance Code. Alternatively Plaintiffs plead for a reasonable and necessary attorney fee in an amount that is one-third (1/3) of any judgment entered herein.

VIII. PRE-JUDGMENT INTEREST. Plaintiffs further assert that they are entitled to recover pre-judgment interest on all the sums recovered, computed in accordance with the Cavnar decision of the Supreme Court of Texas, and for which additional relief Plaintiffs herein sue.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray and request that upon hearing hereof Plaintiffs have their damages and relief as hereinabove alleged, that Plaintiffs be awarded their costs of suit, and that Plaintiffs have pre-judgment and post-judgment at the legal rates; and that Plaintiffs be awarded such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

LAW OFFICES OF JOHN E. KINNEY

By:/S/ John E. Kinney
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EMPLOYER'S UNDERWRITERS, INC.
ROEL NABORS, PRESIDENT
JONATHAN NABORS, VICE-PRESIDENT

PHONE: (205) 355-3056
TOLL FREE: 1-800-622-7635
FAX: (205) 340-0633

1004 4TH AVENUE, S.E.
P. O. DRAWER B
DECATUR, AL 35602-9002

OFFER FOR FULL, FINAL, AND COMPLETE SETTLEMENT

I, Jimmy Weaver, hereby offer to accept a lump sum of $2,700.00 which represents the balance payable for any permanent partial disability as a result of accidental bodily injury sustained by me on or about October 6, 1990.

I hereby agree that my endorsement on a check which you will send me in the amount of $2,700.00 will constitute full, final, and complete settlement of any and all claims arising out of the said injury except for medical expenses, if any.

I am signing this agreement and asking that you send the above mentioned check by return mail.

SIGNED: /S/ Jimmy Weaver DATE: 10-23-91

WITNESS: /S/ Janette Weaver DATE: 10-23-91

ON-THE-JOB ACCIDENT SPECIALISTS

Exhibit A
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